



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216, 225, and 252

[Docket DARS-2015-0045]

RIN 0750-AI69

Defense Federal Acquisition Regulation Supplement: Defense Contractors Performing Private Security Functions (DFARS Case 2015-D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to consolidate all requirements for contractors performing private security functions outside the United States applicable to DoD contracts in the DFARS and make changes regarding applicability and high-level quality assurance standards.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Julie Hammond, telephone 571-372-6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 80 FR 81496 on December 30, 2015, to consolidate all requirements for DoD contractors performing private security functions in certain designated operational areas in the DFARS at 225.302 and the clause at 252.225-7039, Defense Contractors Performing Private Security Functions Outside the United States. The rule also proposed to identify the international high-quality assurance standard "ISO 18788: Management System for Private Security Operations" as an approved alternative to the American standard "ANSI/ASIS PSC.1-2012" currently required by DFARS clause 252.225-7039. One respondent submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. There are no changes from the proposed rule in the final rule. A discussion of the comments is provided as follows:

A. Analysis of Public Comments

Comment: The respondent proposed that the clause at DFARS 252.225-7039 be amended to require a contractor to demonstrate compliance with the American National Standard, ANSI/ASIS PSC.1-2012, and/or the International Standard, ISO 18788, by producing a valid certificate of compliance from a nationally accredited certification body.

Response: DoD does not have the statutory authority to require a certificate of compliance from a certification body accredited by a national accreditation body. Section 833 of the National Defense Authorization Act for Fiscal Year 2011 only authorized that the Secretary of Defense "may provide for the consideration of such certifications as a factor in the evaluation of proposals for award of a covered contract for the provision of private security functions." Therefore, no changes are made in the rule.

Comment: The respondent also proposed that the clause explicitly state that the requirements of ANSI/ASIS PSC.1-2012 "are incumbent upon subcontractors on relevant DoD contracts."

Response: The Government does not have privity of contract with subcontractors. However, paragraph (f) of the clause requires contractors to include the substance of the clause, to include paragraph (c)(4) of the clause, in covered subcontracts. Paragraph (c)(4) of the clause requires compliance with ANSI/ASIS PSC.1-2012 or ISO 18788.

B. Other Changes

For consistency in use of terminology in DFARS clause 252.225-7039, in paragraphs (c)(1) and (2), the term "employees of the Contractor" is removed and replaced with "Contractor personnel" in both places.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the Shelf Items.

This rule amends the DFARS to consolidate all requirements for contractors performing private security functions outside the United States applicable to DoD contracts in the DFARS and makes changes regarding applicability and high-level quality assurance standards. DFARS clause 252.225-7039, Defense Contractors Performing Private Security Functions Outside the United States, and its prescription at DFARS 225.302-6 are amended. The revisions, however, do not affect applicability of the clause at or below the simplified acquisition threshold or to commercial item acquisitions.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section

6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to consolidate all requirements for DoD contractors performing private security functions outside the U.S. from the FAR 25.302 and the clause at FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States, in DFARS 225.302 and the clause at DFARS 252.225-7039, Defense Contractors Performing Private Security Functions Outside the United States.

The objectives of this rule are as follows:

- Provide DoD contracting officers and contractors a single clause covering all requirements related to the performance of private security functions outside the United States that may be updated by DoD as policies are issued that affect only defense contractors.
- Identify the international high-quality assurance standard "ISO 18788: Management System for Private Security Operations"

as an approved alternative to the American standard "ANSI/ASIS PSC.1-2012" currently required by DFARS clause 252.225-7039.

No comments were received from the public in response to the initial regulatory flexibility analysis.

This final rule will apply to defense contractors performing private security functions outside of the United States in designated operational areas under DoD contracts. According to data available in the Federal Procurement Data System for fiscal year (FY) 2013, DoD awarded 159 contracts that required performance outside the United States, although not necessarily in a designated operation area, and cited the National American Industry Classification System code 561612, Security Guards and Patrol Services, of which 33 contracts (21%) were awarded to small businesses. In FY 2014, DoD awarded 123 such contracts, of which 31 contracts (25%) were to small businesses.

The private security contractors are required to report incidents when: (1) a weapon is discharged by personnel performing private security functions; (2) personnel performing private security functions are attacked, killed, or injured; (3) persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel; (4) a weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or (5) active, non-lethal

countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat. As a regular record keeping requirement, private security contractors are required to keep appropriate records of personnel by registering in the Synchronized Predeployment Operational Tracker the equipment and weapons used by its personnel. The complexity of the work to prepare these records requires the expertise equivalent to that of a GS-11, step 5 with clerical and analytical skills to create the documents.

There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

VI. Paperwork Reduction Act

This rule contains information collection requirements under the Paperwork Reduction Act (44 U.S.C. chapter 35). The Office of Management and Budget (OMB) has assigned OMB Control Number 0704-0549, entitled "Defense Federal Acquisition Regulation Supplement (DFARS) part 225, Foreign Acquisition, and Defense Contractors Performing Private Security Functions Outside the United States."

List of Subjects in 48 CFR Parts 216, 225, and 252

Government procurement.

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Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216, 225, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 216, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 216—TYPES OF CONTRACTS

216.405-2-71 [Amended]

2. In section 216.405-2-71, amend paragraph (b) by removing “FAR 52.225-26, Contractors Performing Private Security Functions” and adding “252.225-7039, Defense Contractors Performing Private Security Functions Outside the United States” in its place.

PART 225—FOREIGN ACQUISITION

225.302-6 [Amended]

3. Amend section 225.302-6 introductory text by removing “Outside the United States,” and adding “Outside the United States, instead of FAR clause 52.225-26, Contractors Performing Private Security Functions Outside the United States,” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.225-7039 by—

- a. Removing the clause date "(JAN 2015)" and adding "(JUN 2016)" in its place;
- b. Redesignating paragraphs (a) and (b) as paragraphs (c) and (f), respectively;
- c. Adding new paragraphs (a) and (b);
- d. Revising newly redesignated paragraph (c);
- e. Adding paragraphs (d) and (e);
- f. In newly redesignated paragraph (f), removing "paragraph (b)" and adding "paragraph (f)" in its place.

The additions and revision read as follows:

252.225-7039 Defense Contractors Performing Private Security Functions Outside the United States.

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(a) Definitions. As used in this clause—

Full cooperation—(1) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' requests for documents and access to employees with information;

(2) Does not foreclose any contractor rights arising in law, the FAR or the terms of the contract. It does not require—

(i) The contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(3) Does not restrict the contractor from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Private security functions means the following activities engaged in by a contractor:

(1) Guarding of personnel, facilities, designated sites or property of a Federal agency, the contractor or subcontractor, or a third party.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of this contract.

(b) Applicability. If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the designated area. Designated areas are areas outside the United States of—

(1) Contingency operations;

(2) Combat operations, as designated by the Secretary of Defense;

(3) Other significant military operations (as defined in 32 CFR part 159), designated by the Secretary of Defense upon agreement of the Secretary of State;

(4) Peace operations, consistent with Joint Publication 3-07.3; or

(5) Other military operations or military exercises, when designated by the Combatant Commander.

(c) Requirements. The Contractor shall-

(1) Ensure that all Contractor personnel who are responsible for performing private security functions under this contract comply with 32 CFR part 159 and any orders, directives, or instructions to contractors performing private security functions that are identified in the contract for-

(i) Registering, processing, accounting for, managing, overseeing and keeping appropriate records of personnel performing private security functions;

(ii) Authorizing, accounting for and registering in Synchronized Predeployment and Operational Tracker (SPOT), weapons to be carried by or available to be used by personnel performing private security functions;

(iii) Identifying and registering in SPOT armored vehicles, helicopters and other military vehicles operated by Contractors performing private security functions; and

(iv) In accordance with orders and instructions established by the applicable Combatant Commander, reporting incidents in which—

(A) A weapon is discharged by personnel performing private security functions;

(B) Personnel performing private security functions are attacked, killed, or injured;

(C) Persons are killed or injured or property is destroyed as a result of conduct by Contractor personnel;

(D) A weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(E) Active, non-lethal countermeasures (other than the discharge of a weapon) are employed by personnel performing private security functions in response to a perceived immediate threat;

(2) Ensure that Contractor personnel who are responsible for performing private security functions under this contract are briefed on and understand their obligation to comply with—

(i) Qualification, training, screening (including, if applicable, thorough background checks) and security requirements established by 32 CFR part 159;

(ii) Applicable laws and regulations of the United States and the host country and applicable treaties and international agreements regarding performance of private security functions;

(iii) Orders, directives, and instructions issued by the applicable Combatant Commander or relevant Chief of Mission relating to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals; and

(iv) Rules on the use of force issued by the applicable Combatant Commander or relevant Chief of Mission for personnel performing private security functions;

(3) Provide full cooperation with any Government-authorized investigation of incidents reported pursuant to paragraph (c)(1)(iv) of this clause and incidents of alleged misconduct by personnel performing private security functions under this contract by providing-

(i) Access to employees performing private security functions; and

(ii) Relevant information in the possession of the Contractor regarding the incident concerned; and

(4) Comply with ANSI/ASIS PSC.1-2012, American National Standard, Management System for Quality of Private Security Company Operations—Requirements with Guidance or the International Standard ISO 18788, Management System for Private Security Operations—Requirements with Guidance (located at <http://www.acq.osd.mil/log/PS/psc.html>).

(d) Remedies. In addition to other remedies available to the Government—

(1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements of this clause or 32 CFR part 159. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract;

(2) The Contractor's failure to comply with the requirements of this clause will be included in appropriate databases of past performance and considered in any responsibility determination or evaluation of past performance; and

(3) If this is an award-fee contract, the Contractor's failure to comply with the requirements of this clause shall be considered in the evaluation of the Contractor's performance during the relevant evaluation period, and the Contracting

Officer may treat such failure to comply as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(e) Rule of construction. The duty of the Contractor to comply with the requirements of this clause shall not be reduced or diminished by the failure of a higher- or lower-tier Contractor or subcontractor to comply with the clause requirements or by a failure of the contracting activity to provide required oversight.

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